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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 472

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1940
CERTIORARI GRANTED NOVEMBER 12, 1940

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1 Before United States Board of Tax Appeals

Docket No. 81544

RICHARD VAN NEST GAMBRILL, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT,

Docket entries

Appearances: For Taxpayer—Sidney W. Davidson, Esq.; Ben R. Clark, Esq., Allin H. Pierce, Esq. For Comm'r—W. Frank Gibbs, Esq.

1935

Sept. 14—Petition received and filed. Taxpayer notified (Fee paid)

Sept. 14—Copy of petition served on General Counsel.

Oct. 11—Answer filed by General Counsel.

Oct. 16—Copy of answer served on taxpayer.

1937

Sept. 9—Hearing set 12/9/37.

Oct. 30—Motion to place on Circuit Calendar for hearing in New York City filed by taxpayer. 11/1/37 granted.

2

1938

Feb. 26—Hearing set April 25, 1938, at New York City.

May 4—Hearing had before Mr. Van Fossan, Div. 9 on merits. Submitted. Stipulation of facts filed. Entry of appearance of A. H. Pierce filed. No brief for petitioner. Respondent's brief due June 1, 1938—petitioner's reply due June 16, 1938.

May 16—Transcript of hearing of May 4, 1938, filed.

May 28—Brief filed by General Counsel.

Jun. 16—Reply brief filed by taxpayer. 6/16/38 copy served.

Oct. 21—Findings of fact and opinion rendered, Ernest H. Van Fossan, Div. 9. Decision will be entered under Rule 50.

Nov. 14—Computation of deficiency filed by General Counsel.

Nov. 18—Hearing set Nov. 30, 1938, on settlement.

Nov. 23—Consent to settlement filed by taxpayer.

Nov. 30—Decision entered, Ernest H. Van Fossan, Div. 9.

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1939

Feb. 8—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.

Feb. 14—Proof of service filed by General Counsel.

Mar. 1—Praecipe for record filed by General Counsel with proof of service thereon.

Mar. 14—Proof of service filed by General Counsel.

3 Before United States Board of Tax Appeals

Docket No. 81544

[Same title.]

Petition

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency IT:AR:A-2:MEK-90D, dated June 18, 1935, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with his residence at Peapack, New Jersey.

2. The Notice of Deficiency, a copy of which is attached and marked Exhibit A, was mailed to the petitioner on June 18, 1935.

3. The taxes in controversy are income taxes for the calendar year 1930 and in the amount of \$11,753.40.

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue has erred in holding that the basis for determining gain or loss from the sale or other disposition of certain securities received by the petitioner as remainderman, after the death of the life beneficiary, of a trust created under the last will and testament of Mary Van Nest is the cost to the trustees of the securities purchased by them after March 1, 1913, or the fair market value as of March 1, 1913, of such securities as were acquired prior to that date.

(b) The Commissioner of Internal Revenue has erred in holding that in determining the period for which these securities had been held by the petitioner under the provisions of Section 101 of the Revenue Act of 1928, the date March 1, 1913, or the date on which the securities were purchased by the trustees, were acquired subsequent to that date, should control.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) Under the will of the petitioner's grandmother, Mary Van Nest, who died on November 20, 1897, a trust was created for the benefit of her daughter Anna Van Nest Gambrill, the will providing that the income of the trust should be paid to the said Anna Van Nest Gambrill for life and that upon her death the trustees were to "transfer and deliver the same as she, if leaving issue, shall by will direct, or, in the absence of such direction, to her issue equally." Anna Van Nest Gambrill died on March 23, 1928, without exercising the power of appointment conferred upon her by the will of Mary Van Nest and according to the terms of the said will of Mary Van Nest the trustees in due course transferred the corpus of the trust to the petitioner, who was the sole surviving issue of Anna Van Nest Gambrill.

(b) Upon the death of the life beneficiary on March 23, 1928, the trustees of the trust under the will of Mary Van Nest proceeded with the settlement of their accounts. One of the matters which had to be settled before the trustees could make distribution of the corpus to the remainderman was the question of further taxes due to the State of New York from the estate of Mary Van Nest for inheritance tax on the said remainder interest. In the original appraisal of the estate of Mary Van Nest, filed for the purpose of determining the New York State inheritance tax, the appraiser reported that the value of this remainder interest was not at that time ascertainable, and the collection of the inheritance tax on this remainder interest was therefore held in abeyance under the provisions of Section 221, Chapter 908 of the Laws of 1896 of the State of New York. Under this section the tax on the said remainder interest would become due and payable when the person or persons beneficially entitled thereto should come into actual possession or enjoyment thereof. The tax was made a lien upon the property transferred and the law provided that no trustee should be entitled to a final accounting unless he should produce a receipt sealed and countersigned by the Comptroller of the State of New York, or a copy thereof certified by him, unless a bond should have been filed as prescribed by law. The trustees on or about April 16, 1928, by their attorney, filed a petition in the Surrogate's Court for the County of New York asking for an order modifying the original order fixing the New York State inheritance tax on the estate of Mary Van Nest and on or about May 1, 1928, such an order was entered assessing a tax of \$2,359.91 upon the value of the remainder interest passing to the petitioner. This additional tax was paid on or about May 24, 1928.

(c) The trustees made other payments prior to distribution to the petitioner, which payments included fees to one of the trustees for legal services, commissions to the

trustees or receiving gain on the corpus of the trust and for paying out the corpus of the trust, payments to the executors of the estate of Anna Van Nest Gambrill for income collected after her death, fees for services in preparing Federal and state income tax returns and payments to the trustees for commissions on income. Further transactions had by the trustees after the death of the life tenant included the sale of \$40,000. of New York City 4% bonds, the sale of which was necessary in order to raise funds for the payment of the trustees' commissions and for the payment of the New York State inheritance tax on the remainder interests passing to the petitioner.

(d) There was no judicial settlement of the accounts of the trustees, but the trustees accounted by receipt and release, the release being signed on May 22, 1928, by the petitioner individually, and by Lewis Cass Ledyard, Jr. and the petitioner as executors of the last will and testament of Anna Van Nest Gambrill. The balance of the corpus included in the trust was distributed to the petitioner on or about May 5, 1928.

(e) Certain of the securities included in the said remainder interest so distributed to the petitioner on May 5, 1928, were sold by him during the calendar year 1930. On his Federal income

7 tax return filed on or before March 15, 1931, gain or loss from the sale of these securities was determined by using as the basis for these securities their fair market value as of May 5, 1928. These sales resulted in a loss of \$31,305.63 of which amount \$5,188.44 was claimed as an ordinary current loss and the balance of \$26,117.19 was claimed as a loss from the sale of capital assets as defined by Section 101 of the Revenue Act of 1928. In determining the period for which these securities had been held, the petitioner used the date May 5, 1928, and all of the securities which were sold subsequent to May 5, 1930, were treated as capital assets.

(f) The Commissioner of Internal Revenue in his Notice of Deficiency (Exhibit A) has recomputed the gain or loss from the sale of these securities and has used as a basis for the same the March 1, 1913, value of such securities as were included in the trust prior to March 1, 1913, and the cost of the trustees of such securities as were purchased subsequent to March 1, 1913. In determining the period for which the petitioner had held the securities, the Commissioner of Internal Revenue has used the date March 1, 1913, for securities included in the trust prior to that date and the dates of purchase by the trustees for the securities acquired subsequent to March 1, 1913.

Wherefore the petitioner prays that this Board may hear the proceeding and make a correct determination of his tax liability and grant relief from the deficiency asserted by the

respondent against him in the Notice of Deficiency (Exhibit A) in the following particulars:

8 (a) The petitioner prays that this Board may find that in determining gain or loss realized from the sale of the securities received by him as remainderman of the trust under the will of Mary Van Nest the basis should be the fair market value of the said securities as of May 5, 1928.

(b) The petitioner prays that this Board may find that in determining the period for which the petitioner held the securities received by him as remainderman of the trust under the will of Mary Van Nest under the provisions of Section 101 of the Revenue Act of 1928, the petitioner held such securities from May 5, 1928, to the respective dates of sale.

(c) The petitioner prays that this Board may find that there is no deficiency due on the petitioner's Federal income tax return for the calendar year 1930, and that the proposed deficiency of \$11,753.40 should be abated and set aside.

Dated September 11, 1935.

(S) SIDNEY W. DAVIDSON,
Sidney W. Davidson,

(S) BEN R. CLARK,
Ben R. Clark,

*Counsel for Petitioner,
Office & Post Office Address, 2 Wall Street,
New York, New York.*

9 [Duly sworn to by Richard Van Nest Gambrill; jurat omitted in printing.]

10 *Exhibit A annexed to petition*

Address reply to Commissioner of Internal Revenue.

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE,

TREASURY DEPARTMENT,
Washington, June 18, 1935.

MR. RICHARD VAN NEST GAMBRILL,
C/o Carter, Ledyard & Milburn,
2 Wall Street, New York, N. Y.

SIR: You are advised that the determination of your income tax liability for the year (x) 1930, discloses a deficiency of \$11,753.40 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1928, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within

6 GUY T. HELVERING VS. RICHARD VAN NEST GAMBRILL

ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: C: P-7. The signing and filing of this form will expedite the closing of your return (x) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT

IT: AR: A-2.
MEK-90D.

In re: Richard Van Nest Gambrill,
% Carter, Ledyard & Millburn,
2 Wall Street,
New York, New York

Income Tax Liability

Year 1930: Income tax liability, \$36,289.04; income tax assessed, \$24,585.64; deficiency, \$11,753.40.

The deficiency as shown herein results from adjustments as shown in the report of Internal Revenue Agent C. A. Broach dated September 26, 1932, a copy of which was transmitted to you on November 18, 1932, and to such adjustments made as a result of the conferences held in this office on June 27, 1934, November 7, 1934, and May 13, 1935.

In determining gain or loss on the sale of securities received by you as remainderman of a trust created under the will of Mary Van Nest who died on November 20, 1897, there is used

the same basis as in the hands of the trustee that is the cost of the securities to the trustee or the March 1, 1913 value of such securities as were acquired prior to March 1, 1913, inasmuch as the actual cost is unknown.

In accordance with G. C. M. 14893, Internal Revenue Bulletin Volume XIV, No. 21, where a testator who died in 1910 directed that his estate be held in trust for a period of ten years after his death and at the end of that period be distributed to certain beneficiaries, securities forming a part of the estate were "acquired" by the beneficiaries at the date of death of the testator. The basis of the securities transferred to the beneficiaries in 1920 is the value of the securities at the date of distribution to the trustee by the executor of the estate or the March 1, 1913 value, whichever is greater.

Inasmuch as the taxpayer was in being at the time of his grandmother's death on November 20, 1897, it would appear that the taxpayer's interest in the trust corpus was "acquired" at the time of the formation of the trust. Accordingly, the proper basis in the instant case under section 113 (b) of the Revenue Act of 1928, is the value at the date of distribution to the trustee or the March 1, 1913 value.

Net income is adjusted as follows:

13	Ordinary net income on which deficiency of \$3,911.56 was based	\$101,161.66
	Add: Loss on sale of securities received from the Mary Van Nest Trust eliminated	5,550.57
	Ordinary net income revised	\$106,712.23
	Capital net gain included in previous adjustment	\$101,391.43
	Add:	
	Capital net gain on sale of securities received from the Mary Van Nest Trust	\$60,053.32
	Capital net loss previous adjustment	25,092.94
	Capital net gain revised	\$186,537.69
	Income subject to surtax	\$106,712.23
	Less:	
	Dividends	\$175,632.40
	Interest on Liberty Bonds	271.20
	Personal exemption and credit for dependents	800.00
		176,703.60
	Balance subject to normal tax	None
14	Surtax on \$106,712.23	\$13,002.45
	Tax at 12½% on capital net gain of \$186,537.69	23,317.21
	Total tax	\$36,319.66
	Tax paid at source	30.62
	Tax liability	\$36,289.04
	Tax previously assessed	24,535.64
	Deficiency	11,753.40
	283710-41-2	

8 GUY T. HELVERING VS. RICHARD VAN NEST CAMBRILL

Profit on sale of securities from the Mary Van Nest Trust is determined as follows:

Acquired by trustee	Value reported	March 1, 1913 value or cost to trustee	S. P.
2 A A Third Ave. R. R. 4/30, March 12, 1912.....	\$1,440.00	\$1,717.50	\$1,015.00
54 U. S. Steel pfd., Sept. 9, 1921.....	7,830.00	5,889.93	7,625.34
123 Manhattan Ry., Prior to March 1, 1913.....	7,160.75	15,982.00	4,544.62
15 80 Rensselaer & Saratoga R. R., Prior to March 1, 1913.....	7,275.00	9,025.00	6,898.00
100 Pittsburgh, Ft. Wayne & Chic. Ry., Prior to March 1, 1913.....	16,400.00	16,200.00	15,096.00
16 Chic. & E. Ill. Ry. Pfd., Prior to March 1, 1913.....	762.50	516.14	400.85
405 Glen Alden Coal, Aug. 16, 1921.....	66,369.38	2,025.00	40,380.30
405 Lackawanna Sec., Sept. 18, 1927.....	20,067.35	9,846.46	16,616.80
200 Nat'l. City Bank, Prior to March 1, 1913.....	35,700.00	10,344.00	30,022.44
	\$163,004.98	\$71,546.03	\$731,599.35

Selling price.....\$131,599.35
 Cost or March 1, 1913, value.....71,546.08
 Profit (Capital net gain).....\$60,053.32

Explanation of Changes

In determining the gain or loss based on the value as of May 5, 1928, the date of distribution, an ordinary loss of \$5,550.57 and capital net loss of \$25,092.94 were determined.

16 Computation of gain or loss based on the cost of the securities to the trustees or March 1, 1913, value, results in a profit of \$60,053.32, therefore, the ordinary loss of \$5,550.57 is eliminated.

A copy of this letter, together with a copy of the statement and schedules has been mailed to your representative Mr. Ben R. Clark, % Carter Ledyard & Milburn, 2 Wall Street, New York, New York, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

17 Before United States Board of Tax Appeals

Docket No. 81544

[Same title.]

Answer

The Commissioner of Internal Revenue by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. (a), (b). Denies that the Commissioner erred in respect of the matters set forth in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. (a), (b), (c), (d), (e), (f). Denies the allegations contained in subparagraphs (a), (b), (c), (d), (e), and (f) of paragraph 5 of the petition.

6. Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:

WILLIAM E. DAVIS,
STANLEY B. ANDERSON,
Special Attorneys,
Bureau of Internal Revenue.

SBA-eds-10-10-35.

18 Before United States Board of Tax Appeals

Docket No. 81544. Promulgated October 21, 1938

[Same title.]

1. Held, that under section 113 (a) (5) of the Revenue Act of 1928 the basis for determining gain or loss from the sale of securities acquired by a remainderman after the death of the life beneficiary of a testamentary trust is the fair market value of the property when distributed to the taxpayer at the termination of the trust.

2. Held, under the capital gains provisions of section 101 of the Revenue Act of 1928, that the securities in question were not "held by the taxpayer," petitioner remainderman, from the date of the death of the original grantor.

Ben R. Clark, Esq., and Allin H. Pierce, Esq., for the petitioner. W. Frank Gibbs, Esq., for the respondent.

Findings of fact and opinion

This proceeding was brought for a redetermination of a deficiency of \$11,753.40 in petitioner's income tax for the calendar year 1930.

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The questions presented are (1) the date to be used in fixing the basic valuation of securities which petitioner had received as remainderman of a testamentary trust after the death of 19 the life beneficiary for the purpose of determining taxable gain or loss to petitioner on the sale thereof; and (2) the date to be used for the purpose of determining the period for which these securities were held by petitioner prior to their sale within the meaning of the capital net gains and losses provisions of the applicable statute.¹

Findings of fact

The facts were stipulated substantially as follows:

Mary Van Nest died a resident of the County of New York, State of New York, on November 20, 1897, leaving a last will and testament which was duly admitted to probate by the Surrogate of the County of New York, letters testamentary being issued to Franklin W. Gilley, Giraud Foster, and Thomas Thacher as executors.

The ninth article of this will reads in part as follows:

"NINTH. All the residue of my estate of every kind I give and devise as follows:

"One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

"The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her 20 during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living. * * *"

The executors proceeded with the administration of the estate and on or about January 4, 1898, they delivered to themselves, as trustees for Anna Van Nest Gambrill, the following securities at the following prices:

375 shares Farmers Loan & Trust Co., par value \$25.....	\$76,406.25
800 shares Harlem Railroad Co.....	48,000.00
100 shares Pittsburgh & Fort Wayne Railroad.....	16,900.00

¹ Sec. 101, Revenue Act of 1928.

200 shares New York, N. H. & H. R. R. R.	\$36,000.00
300 shares Delaware, Lackawanna & Western Railroad	23,250.00
50 shares Rensselaer & Saratoga Railroad	9,250.00
75 shares Chicago & North Western Railroad, preferred	12,225.00
Total	222,631.25

Separate trusts were likewise set up by the trustees for each of other three life beneficiaries named in the will of Mary Van Nest and securities of a value equal to the value of those set forth above in favor of Anna Van Nest Gambrill were delivered by the executors to themselves as trustees for Mary Van Nest Jackson, Jennie Van Nest Foster, and Mary Alice Van Nest.

21 Anna Van Nest Gambrill, mother of petitioner and the life beneficiary of one of the trusts, died on March 23, 1928, without having exercised the power of appointment conferred upon her by the ninth article of the will of Mary Van Nest. Her sole surviving issue was petitioner, Richard Van Nest Gambrill, who was born prior to the death of Mary Van Nest.

Upon the death of Anna Van Nest Gambrill, the trustees of the trust for her benefit under the will of Mary Van Nest proceeded with the settlement of their accounts. One of the matters which had to be settled before the trustees could make distribution of the corpus to the petitioner as remainderman was the question of additional inheritance taxes due to the State of New York from the estate of Mary Van Nest on the remainder interest. In the original appraisal of the estate of Mary Van Nest, filed for the purpose of determining the New York State inheritance tax, the appraiser reported that the value of this remainder interest was not at that time ascertainable, and the collection of the inheritance tax on this remainder interest was therefore held in abeyance under the provisions of section 221, chapter 908, Laws of 1896 of the State of New York. Under this section the tax on the remainder interest would become due and payable when the person or persons beneficially entitled thereto should come into actual possession or enjoyment thereof. The tax was made a lien upon the property transferred, and the law provided that no trustee should be entitled to a final accounting unless he should produce a receipt sealed and countersigned by the Comptroller of the State of New York, or a copy thereof certified by him, unless a bond should have been filed as prescribed by law. On or about the 16th day of April 1928, the trustees by their attorney filed a petition in the Surrogate's

22 Court for the County of New York, asking for an order modifying the original order fixing the New York State inheritance tax on the estate of Mary Van Nest, and on or about May 1, 1928, an order was entered assessing a tax of \$2,359.91

12 GUY T. HELVERING VS. RICHARD VAN NEST GAMBRILL

upon the value of the remainder interest passing to the petitioner. This tax was paid on or about May 24, 1928.

Other payments made by the trustees prior to the transfer and delivery of the corpus to petitioner included fees for legal services, commissions to the trustees on receiving gain on the corpus of the trust and for paying out the corpus of the trust, payments to the executors of the estate of Anna Van Nest Gambrill for income collected after her death, fees for services in preparing Federal and state income tax returns, and payments to the trustees for commissions on income. Other transactions by the trustees after the death of the life tenant included the sale of \$40,000 of New York City 4's of 1936, the sale of which was required in order to raise funds for the payment of the trustees' commissions and for the payment of the New York State inheritance tax on the remainder interests passing to the petitioner.

There was no judicial settlement of the accounts of the trustees, but the trustees accounted by receipt and release, the release being signed on May 22, 1928, by petitioner individually, and by Lewis Cass Ledyard, Jr., and petitioner as executors of the last will and testament of Anna Van Nest Gambrill. The balance of the corpus included in the trust as to which petitioner was remainderman was delivered to petitioner in accordance with the terms of the will of Mary Van Nest, on or about May 5, 1928.

During the calendar year 1930 petitioner sold certain of the securities which had been delivered to him by the trustees. In computing gain or loss from the sale of these securities, petitioner used their fair market value as of May 5, 1928.

23 These securities sold in 1930, together with the proceeds received therefor, the dates of sale, and the fair market value as of May 5, 1928, are as follows:

Securities	Date of sale—1930	Proceeds	May 5, 1928 value
\$2,000 Third Avenue Railroad 4/60	Feb. 18	\$1,015.00	\$1,440.00
54 shares United States Steel preferred	Feb. 18	7,625.34	7,830.00
122 shares Manhattan Railway	Feb. 20	4,544.62	7,100.75
50 shares Rensselaer & Saratoga Railroad	Feb. 19	6,898.00	7,275.00
100 shares Pittsburgh, Fort Wayne & Chicago Railway	Feb. 20	15,098.00	16,400.00
10 shares Chicago & Eastern Illinois Railway preferred	Feb. 21	400.85	762.50
405 shares Glen Alden Coal	May 6	40,380.30	66,369.88
405 shares Lackawanna securities	June 4	16,616.80	20,067.35
200 shares National City Bank	June 9	39,022.44	35,700.00
Total		131,590.35	163,004.98

The March 1, 1913, fair market value of the securities acquired prior to that date, or the cost, whichever is greater, and the cost to the trustees of the securities acquired after March 1, 1913, are as follows:

24 Securities	Acquired by trustees	March 1, 1913 or cost to trustees
\$2,000 Third Avenue Railroad 4/60.....	Mar. 12, 1912.....	\$1,717.50
54 shares United States Steel preferred.....	Sept. 9, 1921.....	5,889.93
122 Shares Manhattan Railway.....	Prior to Mar. 1, 1913.....	15,982.00
50 shares Rensselaer & Saratoga Railroad.....	Prior to Mar. 1, 1913.....	9,025.00
100 shares Pittsburgh, Fort Wayne & Chicago Railway.....	Prior to Mar. 1, 1913.....	10,200.00
10 shares Chicago & Eastern Illinois Railway preferred.....	Prior to Mar. 1, 1913.....	516.14
405 shares Glen Alden Coal.....	Aug. 16, 1921.....	2,025.00
405 shares Lackawanna securities.....	Sept. 16, 1927.....	9,846.43
200 shares National City Bank.....	Prior to Mar. 1, 1913.....	10,344.00
Total.....		71,546.03

The fair market values of these securities as of March 23, 1928, the date of death of the life beneficiary, Anna Van Nest Gambrill, are as follows:

Securities	Adjusted value Mar. 23, 1928
\$2,000 Third Avenue Railroad 4/60.....	\$1,380.00
54 shares United States Steel, preferred.....	7,830.00
25 122 shares Manhattan Railway.....	5,154.50
50 shares Rensselaer & Saratoga Railroad.....	7,225.00
100 shares Pittsburgh, Fort Wayne & Chicago Railway.....	16,500.00
10 shares Chicago & Eastern Illinois Railway, preferred.....	700.00
405 shares Glen Alden Coal.....	62,471.25
405 shares Lackawanna securities.....	19,398.46
200 shares National City Bank.....	31,400.00
Total.....	152,059.21

In determining the period for which petitioner had held these securities, under the provisions of section 101 of the Revenue Act of 1928, petitioner used the date May 5, 1928, whereas respondent has determined that the period held should be computed from November 20, 1897, the date of the death of Mary Van Nest, in the case of securities owned by her at the time of her death, and from the dates of purchase in the case of securities subsequently purchased by the trustees.

Opinion

VAN FOSSAN. The first of two major questions presented by the case at bar is the date to be used for the purpose of fixing the basic valuation in determining the gain or loss to petitioner on the sale of securities which he received as remainderman of a testamentary trust after the death of the life beneficiary.

26 The second question is the date to be used in determining the period for which these same securities were held by petitioner prior to their sale, within the meaning of the capital gains provisions of the applicable revenue act.³

³ Sec. 101, Revenue Act of 1928.

The securities which petitioner received as remainderman, after the death of the life beneficiary, are capable of being divided into two categories, the first being those securities which had come to the trustees as part of the trust res, and the second being those securities which were purchased by the trustees with trust funds, subsequent to March 1, 1913, and held by them until delivery to petitioner in 1928.

The statutory provisions governing the basis for the determination of gain or loss are found in section 113 of the Revenue Act of 1928 and those here pertinent are as follows:

"(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

"(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons, entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

"(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

"(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

"(2) the fair market value of such property as of March 1, 1913,

"whichever is greater." In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date."

As to the first above indicated issue, respondent urges that petitioner's interest under the testamentary trust was a
 28 vested interest under the controlling law of New York (as to the securities which were a part of the original trust res); that where property is bequeathed in trust, distribution by the executor of the donee's estate to the trustee constitutes the "distribution to the taxpayer" contemplated by the statute (as to the securities which were acquired by the trustees with trust funds); that where trustees purchase property with trust funds, and later distribute the property so acquired to the taxpayer, such property is not "acquired by will or intestacy" within the meaning of the above quoted statute.

Even though petitioner's interest under New York law may be a vested interest acquired at the date of testator's death, which was prior to March 1, 1913, and as such brings the matter within the purview of section 113 (b), that section, by its terms, makes section 113 (a) (5) controlling. The date of acquisition therefore is removed from the picture and the date for determining gain or loss is the date prescribed by section 113 (a) (5). Counsel are agreed that the applicable provision of the subsection is the provision covering "all other cases" and that the basis therefore is "the fair market value of the property at the time of the distribution to the taxpayer."

Respondent concedes that Ralph W. Harbison, 26 B. T. A. 896,³ Mary Colgate, 27 B. T. A. 506,⁴ Margaret E. B. Fleming, 36 B. T. A. 773, are all contrary to the position he takes on the first issue. These cases, together with *Van Nostrand v.*

29 *United States*, 18 Fed. Supp. 295, affd., 94 Fed. (2d) 510, hold that the phrase "time of distribution to the taxpayer" as used in the statute, means the time when this property was actually delivered to or made available for the use of the taxpayer.

However, respondent cites *Jenkins v. Smith* (U. S. Dist. Ct., Dist. Conn.), 21 Fed. Supp. 433, as squarely supporting his contentions, and urges that this Board reconsider the entire issue on the basis of the *Jenkins* case and the arguments presented in the brief in the case at bar.

After a careful consideration of respondent's arguments and with due deference to the District Court for the District of Connecticut, we are constrained to adhere to our original position. Nothing is presented which would justify our recantation. We, therefore, hold that the basis to petitioner for the purpose of determining gain or loss on the sale of the securities in question

³ Reversed on another issue, 68 Fed. (2d) 1004; 293 U. S. 144.

⁴ Reversed on another issue, mandate C. C. A., 2d Cir., on stipulation to abide by decision in *Ellis v. Commissioner*, 68 Fed. (2d) 800; 293 U. S. 144.

is the fair market value of such securities on May 5, 1928, the date when the corpus of the trust was delivered to petitioner. This was the time of the "distribution to the taxpayer." Cf. Robert A. Taft, Trustee, 34 B. T. A. 603; Bessie C. Williamson, 34 B. T. A. 924.

Respondent urges that the second issue, being concerned with the capital gains provisions of the statute, is not dependent upon the date used under section 113 for determining the basis for gain or loss and that the securities here involved have been held by petitioner, within the meaning of section 101 of the Revenue Act of 1928, since the respective dates on which they were acquired by the trust estate. In other words, that those securities which were a part of the original trust res were "held by the taxpayer" since the death of the testator, and those securities which were acquired by the trustee with trust funds were "held by the taxpayer" since the time of their purchase.

Respondent relies on *McFeely v. Commissioner*, 296 U. S. 30 102, which case directly severs any dependence of section 101 on section 113 for the determination of the holding period.

In addressing itself to the question presented in the *McFeely* case the Supreme Court, through Justice Roberts, declared that "held" and "acquired" were in effect synonymous, and stated:

"* * * In common understanding, to hold property is to own it. In order to own or hold, one must acquire. The date of acquisition is, then, that from which to compute the duration of ownership or length of holding. Whether under local law title to personal property passes from a decedent to the legatee or next of kin at death subject to a withholding of possession for purposes of administration, or passes to the personal representative for the purposes of administration—the title of the beneficiary, though derived through the executor, relating back to the date of death—is for the present purposes immaterial. In either case, the date of acquisition, within the intent of the Revenue Act is the date of death." [Citing *Brewster v. Gage*, 280 U. S. 327.]

To determine the application of the *McFeely* case to the case at bar, it is necessary to consider the particular questions involved in the two cases. The *McFeely* case, which is really a consolidation of five cases, is concerned with the administration period between the date of death of the original holder and the date of actual acquisition by the respective taxpayers, and involves, respectively, residuary legatees, the donee of a widow who elected to take against her husband's will, and one taking under intestate laws. The Court states the question "whether property acquired from a decedent through intestacy, or

31 a general bequest, is, within the meaning of the clause [held by the taxpayer for more than two years] held by the taxpayer from the date of decedent's death or from the date of distribution." The case at bar is concerned with the date of acquisition of a remainderman's interest in a trust estate after the death of the life beneficiary. This, we think, presents a distinctly different problem, one not ruled on in the cited case. For this reason we do not deem the McFeely case controlling here.

As above noted, respondent contends that the securities which were originally a part of the trust estate were "held by the taxpayer" from the date of the death of the original grantor (1897), and those purchased with trust funds were held from the date of such purpose. This contention was based on McFeely v. Commissioner, supra, which, as above indicated, we have rejected as controlling in the case at bar.

Petitioner urges that the controlling date is May 5, 1928, the date of delivery of the trust corpus to petitioner. Whether this date or that of March 23, 1928, the date of death of the life beneficiary, is the determinative date it is not necessary in this case to decide. The result is the same whichever be taken. The findings of fact establish that certain securities were sold prior to March 23, 1930, and that others were sold after May 5, 1930. None were sold in the interval between the two dates.

We hold that those securities sold in February 1930 had not been held by the taxpayer for more than two years and were, therefore, not capital assets, while those sold on May 6 and in June 1930 had been held by taxpayer for more than two years and were, therefore, capital assets.

Decision will be entered under Rule 50.

[SEAL]

32 Before United States Board of Tax Appeals,
Washington

Docket No. 81544

[Same title.]

Decision

Pursuant to the Findings of Fact and Opinion of the Board promulgated October 21, 1938, the respondent herein having on November 14, 1938, filed a recomputation and the petitioner having on November 23, 1938, filed an acquiescence therein, now therefore, it is ordered and decided: That there is an overpayment in income tax for the year 1930 in the amount of \$75.60, which amount was paid within two years of the filing of the petition

18 GUY T. HELVERING VS. RICHARD VAN NEST GAMBRILL

in accordance with the provisions of Section 809 (c), Revenue Act of 1938.

[SEAL]

(S) ERNEST H. VAN FOSSAN, *Member.*

Enter.

Entered November*30, 1938.

33 In United States Circuit Court of Appeals for the
Second Circuit

B. T. A. Docket No. 81544

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
PETITIONER ON REVIEW

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT ON REVIEW

Petition for review and assignments of error

Now comes the Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John M. Morawski, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The respondent on review, Richard Van Nest Gambrill (hereinafter referred to as the taxpayer), is an individual
34 with his residence at Peapack, New Jersey. His individual income tax return for the year 1930 was filed with the Collector of Internal Revenue for the Second District of New York, whose office is located at New York, N. Y., and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1001, 1002, and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II

PRIOR PROCEEDINGS

On June 18, 1935, the Commissioner determined a deficiency in income tax against the taxpayer for the year 1930 in the amount of \$11,753.40, and sent by registered mail a notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928, as amended by Section 501 of the Revenue Act of 1934. Thereafter, and on Sept. 14, 1935, the taxpayer filed an appeal from the said determination of the Commissioner with the United States Board of Tax Appeals.

The case was tried before the United States Board of Tax Appeals on May 4, 1938.

On October 21, 1938, the Board promulgated its findings of fact and opinion and on November 30, 1938, entered its decision, wherein it was ordered and decided that there is an overpayment in income tax for the year 1930 in the amount of \$75.60.

35

III

NATURE OF CONTROVERSY

The questions presented to the Board were: (1) The date to be used in fixing the basic valuation of securities which taxpayer had received as remainderman of a testamentary trust after death of the life beneficiary for the purpose of determining taxable gain or loss to taxpayer on the sale thereof; and (2) the date to be used for the purpose of determining the period for which these securities were held by taxpayer prior to their sale within the meaning of the capital net gains and losses provisions of the statute (Section 101 of the Revenue Act of 1928).

The taxpayer was remainderman of a testamentary trust under the will of his grandmother, who died in 1897. The life beneficiary, the taxpayer's mother, died on March 23, 1928, and on May 5, 1928, certain securities constituting the corpus of the trust were delivered to the taxpayer by the trustees in accordance with the terms of the testator's will. The securities thus received by taxpayer as remainderman may be divided into two categories, the first being those securities which had come to the trustees as a part of the trust *res* and the second being those securities which were purchased by the trustees with trust funds subsequent to March 1, 1913, and held by them until delivery to the taxpayer at the termination of the trust in 1928. Some of the securities were sold by the taxpayer in February 1930 and other securities were sold on May 6 and in June 1930. In

computing the gain or loss from the sale of these securities, taxpayer used their fair market value as of May 5, 1928, taking that date to be the "time of the distribution to the taxpayer," within the meaning of Section 113 (a) (5) of the Revenue Act of 1928. The Commissioner urged that as to the securities which were a part of the original trust *res* the distribution by the executors of the testatrix's estate to the trustees constituted the "distribution to the taxpayer" contemplated by the statute, and argued further (with respect to those securities which were acquired by the trustees with trust funds, that where trustees purchase property with trust funds and later distribute the property so acquired to the taxpayer, such property is not "acquired by will or intestacy" within the meaning of Section 113 (a) (5). The Board held that the provisions of Section 113 (a) (5) are controlling herein and that the taxpayer was entitled to use as the basis for determining gain "the fair market value of the property at the time of the distribution to the taxpayer." It was further held that the phrase "at the time of the distribution to taxpayer," as used in the statute, means the time when this property was actually delivered to or made available for the use of the taxpayer. Applying this ruling to the facts hereinabove set out, the Board found that the time of the distribution to the taxpayer in the instant case was May 5, 1928, the date when the corpus of the trust was delivered to the taxpayer.

The Commissioner determined that the securities sold by the taxpayer in 1930 were "held by the taxpayer," within the meaning of Section 101 of the Revenue Act of 1928, from the respective dates they were acquired by the trust estate and therefore having been held for more than two years, were capital assets. The taxpayer took as the controlling date May 5, 1928, the date of delivery of the trust corpus to the taxpayer. The Board held that it was unnecessary to decide whether the determinative date was May 5, 1928 (date of distribution) or March 23, 1928, the date of death of the life beneficiary, for the reason that the result in this case is the same whichever be taken. The Board held that those securities sold in February 1930 had not been held by the taxpayer for more than two years and were therefore not capital assets while those sold on May 6 and in June 1930 had been held by taxpayer for more than two years and were therefore capital assets.

IV

ASSIGNMENTS OF ERROR

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and in the opinion and final

decision rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceeding, opinion and final decision so rendered and entered by the Board of Tax Appeals:

1. The Board of Tax Appeals erred in holding and deciding that there is an overpayment in income tax for the year 1930 in the amount of \$75.60.

2. The Board of Tax Appeals erred in failing to hold and decide that there is a deficiency in income tax for the year 1930 in the amount of \$11,753.40.

3. The Board of Tax Appeals erred in holding and deciding that the phrase "the time of distribution to the taxpayer," as used in the statute, means the time when this property was actually delivered to or made available for the use of the taxpayer.

4. The Board of Tax Appeals erred in holding and deciding that the basis to taxpayer for the purpose of determining a gain or loss on the sale of the securities in question is the fair market value of such securities on May 5, 1928, the date when the corpus of the trust was delivered to taxpayer, and that this was the time of the "distribution to the taxpayer."

5. The Board of Tax Appeals erred in failing to hold and decide as to the securities which were a part of the original trust *res* that the distribution by the executors of the testatrix's estate to the trustees constituted the "distribution to the taxpayer," contemplated by the statute.

6. The Board of Tax Appeals erred in failing to hold and decide as to the securities which were acquired by the trustees with trust funds that such property is not "acquired by will or intestacy" within the meaning of Section 113 (a) (5) of the Revenue Act of 1928 and hence take as their basic cost to the trustees.

7. The Board of Tax Appeals erred in holding and deciding that those securities sold in February 1930, had not been held by the taxpayer for more than two years and were therefore not capital assets.

8. The Board of Tax Appeals erred in failing to hold and decide that the securities sold by the taxpayer in 1930 were "held by the taxpayer," within the meaning of Section 101 of the Revenue Act of 1928, from the respective dates they were acquired by the trust estate and therefore having been held for more than two years, were capital assets.

9. The Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to law.

39 Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) JAMES W. MORRIS,
Assistant Attorney General,

(Signed) J. P. WENCHEL
R. L. W.

(Signed) J. P. WENCHEL,
J. P. Wencel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

JOHN M. MORAWSKI,
Special Attorney,
Bureau of Internal Revenue.

40 [Duly sworn to by John M. Morawski; jurat omitted in printing.]

41 In United States Circuit Court of Appeals for the
Second Circuit

B. T. A. Docket No. 81544

[Same title.]

Notice of filing petition for review

To BEN R. CLARK, Esq., and ALLIN H. PIERCE, Esq.,
2 Wall Street, New York, N. Y.

You are hereby notified that the Commissioner of Internal Revenue did, on the 8th day of February 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 8th day of February 1939.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors

mentioned therein, is hereby acknowledged this 9th day of February 1939.

(Signed) BEN R. CLARK,
(Signed) ALLIN H. PIERCE,
Attorneys for Respondent on Review.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

42 In United States Circuit Court of Appeals for the
Second Circuit

B. T. A. Docket No. 81544

[Same title.]

Notice of filing petition for review

To Mr. RICHARD VAN NEST GAMBRILL,
Peapack, New Jersey.

You are hereby notified that the Commissioner of Internal Revenue did, on the 8th day of February 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 8th day of February 1939.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 10 day of March, 1939.

(Signed) RICHARD V. N. GAMBRILL,
Respondent on Review.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

24 GUY T. HELVERING VS. RICHARD VAN NEST GAMBRILL

43 Before the United States Board of Tax Appeals

Docket No. 81544

RICHARD VAN NEST GAMBRILL, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Stipulation of facts

It is hereby stipulated and agreed by and between the parties hereto acting by their respective counsel that for the purposes of the trial of this proceeding, or any hearing or rehearing with respect thereto, or any appeal therefrom or review thereof, the following facts shall be deemed to be proven without the submission of any proof other than this stipulation, without prejudice, however, to the right of either party to object to the materiality of any fact:

First. Mary Van Nest died a resident of the County of New York, State of New York, on the 20th day of November 1897, leaving a last will and testament which was duly admitted to probate by the Surrogate of the County of New York, letters testamentary being issued to Franklin W. Gilley, Giraud Foster and Thomas Thacher as executors.

The ninth article of this will reads in part as follows:

"NINTH. All the residue of my estate of every kind I give and devise as follows:

"One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

44 "The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living. * * *

Second. The executors above named proceeded with the administration of the estate and on or about the 4th day of January 1898, they delivered to themselves as trustees for Anna Van Nest Gambrill, the following securities at the following prices:

375 shs. Farmers Loan & Trust Co. par value \$25.....	\$76,406.25
300 shs. Harlem Railroad Co.....	48,000.00
100 shs. Pittsburgh & Fort Wayne Railroad.....	16,900.00
200 shs. New York, N. H. & H. R. R. R.....	36,600.00
300 shs. Delaware, Lackawanna & Western Railroad.....	23,250.00
50 shs. Rensselaer & Saratoga Railroad.....	9,250.00
75 shs. Chicago & North Western Railroad, preferred.....	12,225.00
Total	\$222,631.25

45 Separate trusts were likewise set up by the trustees for each of the other three life beneficiaries named in the will of Mary Van Nest and securities of equal value as those set forth above in favor of Anna Van Nest Gambrill were delivered by the executors to themselves as trustees for Mary Van Nest Jackson, Jennie Van Nest Foster, and Mary Alice Van Nest.

Third. Anna Van Nest Gambrill, mother of petitioner and the life beneficiary of one of the aforesaid trusts, died on March 23, 1928, without having exercised the power of appointment conferred upon her by the ninth article of the will of Mary Van Nest. Her sole issue her surviving was the petitioner, Richard Van Nest Gambrill, who was born prior to the death of Mary Van Nest.

Fourth. Upon the death of said Anna Van Nest Gambrill, the trustees of the trust for her benefit under the will of Mary Van Nest proceeded with the settlement of their accounts. One of the matters which had to be settled before the trustees could make distribution of the corpus to the petitioner as remainderman was the question of additional inheritance taxes due to the State of New York from the estate of Mary Van Nest on the said remainder interest. In the original appraisal of the estate of Mary Van Nest, filed for the purpose of determining the New York State inheritance tax, the appraiser reported that the value of this remainder interest was not at that time ascertainable and the collection of the inheritance tax on this remainder interest was therefore held in abeyance under the provisions of Section 221, Chapter 908, laws of 1896 of the State of New York. Under this section the tax on the said remainder interest would become due and payable when the person or persons beneficially entitled thereto should come into actual possession or enjoyment thereof. The tax was made a lien upon the property

46 transferred and the law provided that no trustee should

be entitled to a final accounting unless he should produce a receipt sealed and countersigned by the Comptroller of the State of New York, or a copy thereof certified by him unless a bond should have been filed as prescribed by law. On or about the 16th day of April 1928, the trustees by their attorney filed a petition in the Surrogate's Court for the County of New York, asking for an order modifying the original order fixing the New York State inheritance tax on the estate of Mary Van Nest, and on or about the 1st day of May 1928, an order was entered assessing a tax of \$2,359.91 upon the value of the remainder interest passing to the petitioner. This tax was paid on or about the 24th day of May 1928.

Fifth. Other payments made by the trustees prior to the transfer and delivery of the corpus to the petitioner included fees for legal services, commissions to the trustees on receiving gain on the corpus of the trust and for paying out the corpus of the trust, payments to the executors of the estate of Anna Van Nest Gambrill for income collected after her death, fees for services in preparing Federal and State income tax returns and payments to the trustees for commissions on income. Other transactions by the trustees after the death of the life tenant included the sale of \$40,000. New York City 4's of 1936, the sale of which was required in order to raise funds for the payment of the trustees' commissions and for the payment of the New York State inheritance tax on the remainder interests passing to the petitioner.

Sixth. There was no judicial settlement of the accounts of the trustees, but the trustees accounted by receipt and release, the release being signed on May 22, 1928, by the petitioner individually, and by Lewis Cass Ledyard, Jr., and the petitioner as executors of the last will and testament of Anna Van Nest Gambrill. The balance of the corpus included in the trust as
47 to which this petitioner was remainderman was delivered to the petitioner in accordance with the terms of the will of Mary Van Nest on or about May 5, 1928.

Seventh. During the calendar year 1930, the petitioner sold certain of the securities so delivered to him by the said trustees. In computing gain or loss from the sale of these securities, the petitioner used their fair market value as of May 5, 1928. These securities sold in 1930, together with the proceeds received there-

for, the dates of sale and the fair market value as of May 5, 1928, are as follows:

Name of securities	Date of sale 1930	Proceeds	May 5, 1928 value
\$2,000 Third Avenue Railroad 4/60	Feb. 18	\$1,015.00	\$1,440.00
54 shs. United States Steel, preferred	Feb. 18	7,625.34	7,830.00
122 shs. Manhattan Railway	Feb. 20	4,544.62	7,160.75
50 shs. Rensselaer & Saratoga Railroad	Feb. 19	6,998.00	7,275.00
100 shs. Pittsburgh, Fort Wayne & Chicago Railway	Feb. 20	15,096.00	16,400.00
10 shs. Chicago & Eastern Illinois Railway, preferred	Feb. 21	400.85	762.50
405 shs. Glen Alden Coal	May 6	40,380.30	66,369.38
405 shs. Lackawanna securities	June 4	16,616.80	20,067.35
200 shs. National City Bank	June 9	39,022.44	36,700.00
Total		\$131,509.35	\$163,004.98

48 Eighth. The March 1, 1913, fair market value of the securities acquired prior to that date, or the cost, whichever is greater, and the cost to the trustees of the securities acquired after March 1, 1913, are as follows:

Name of securities	Acquired by trustees	March 1, 1913 or cost to trustees
\$2,000 Third Avenue Railroad 4/60	March 12, 1912	\$1,717.50
54 shs. United States Steel, preferred	Sept. 9, 1921	5,880.03
122 shs. Manhattan Railway	Prior to March 1, 1913	15,932.00
50 shs. Rensselaer & Saratoga Railroad	Prior to March 1, 1913	9,625.00
100 shs. Pittsburgh Fort Wayne & Chicago Railway	Prior to March 1, 1913	16,200.00
10 shs. Chicago & Eastern Illinois Railway, preferred	Prior to March 1, 1913	516.14
405 shs. Glen Alden Coal	August 16, 1921	2,025.00
405 shs. Lackawanna securities	Sept. 16, 1927	9,846.48
200 shs. National City Bank	Prior to March 1, 1913	10,344.00
Total		\$71,546.03

Ninth. The fair market values of these securities as of March 23, 1928, the date of the death of the life beneficiary Anna Van Nest Gambrill are as follows:

Name of securities	Adjusted value March 23, 1928
\$2,000 Third Avenue Railroad 4/60	\$1,380.00
54 shs. United States Steel, preferred	7,830.00
122 shs. Manhattan Railway	5,154.50
50 shs. Rensselaer & Saratoga Railroad	7,225.00
100 shs. Pittsburgh, Fort Wayne & Chicago Railway	16,500.00
10 shs. Chicago & Eastern Illinois Railway, preferred	700.00
405 shs. Glen Alden Coal	62,471.25
405 shs. Lackawanna securities	19,398.48
200 shs. National City Bank	31,400.00
Total	\$152,059.21

Tenth. In determining the period for which the petitioner had held these securities, under the provisions of Section 101 of the Revenue Act of 1928, the petitioner used the date May 5, 1928,

whereas the respondent has determined that the period held should be computed from the 20th day of November 1897, the date of the death of Mary Van Nest in the case of securities owned by her at the time of her death and from the dates of purchase in the case of securities subsequently purchased by the trustees.

(Signed) BEN R. CLARK,
Ben R. Clark,
Counsel for Petitioner,
Office & Post Office Address,
2 Wall Street, New York, New York.
(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

50 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 81544

Præcipe for record

TO the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries.
2. Pleadings:
 - (a) Petition.
 - (b) Answer to Petition.
- 51 3. Findings of Fact and Opinion promulgated October 21, 1938.
4. Decision entered November 30, 1938.
5. Petition for Review.
6. Notices of Filing Petition for Review.
7. Stipulation of Facts.
8. Præcipe for Record.

Service of a copy of the within praecipe is hereby admitted this 23 day of February 1939.

(Signed) BEN R. CLARK,

(Signed) ALLIN H. PIERCE,

Attorneys for Respondent on Review.

(Signed) J. P. WENCHEL,

R. L. W.

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

52 [Clerk's certificate to foregoing transcript omitted in printing.]

53 In United States Circuit Court of Appeals for the Second Circuit

Nos. 41-257-258-259—October Term 1939

(Argued February 15, 1940. Decided June 10, 1940)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS, RESPONDENT

54 Petitions by the Commissioner of Internal Revenue to review determinations of the United States Board of Tax Appeals in respect to income taxes of the respondents Gambrill and Knox for the year 1930, and of the respondents Campbell and Rogers for the year 1933. Affirmed.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Sewall Key, Acting Assistant Attorney General, J. L. Monarch and Newton K. Fox, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceeding against the respondent Gambrill. Samuel O. Clark, Assistant Attorney General, Sewall Key and Arthur A. Armstrong, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceedings against the respondents Campbell, Knox, and Rogers. Sidney W. Davidson, Ben R. Clark, and Allin H. Pierce, Counsel for the respondent Gambrill. James McCormick Mitchell, John L. Kenefick, and Ralph M. Andrews, Counsel for the respondents Campbell, Knox, and Rogers.

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Opinion

AUGUSTUS N. HAND, Circuit Judge:

The foregoing proceedings all involve the correctness of income tax assessments by the Commissioner of Internal Revenue and in each the Commissioner has appealed from decisions of the Board of Tax Appeals modifying his assessments.

In the Gambrill case the Commissioner assessed an income tax deficiency of \$11,753.40 for the year 1930, while the Board of Tax Appeals determined that there was an overpayment of \$75.60 by the taxpayer. In the Knox case the Commissioner assessed a deficiency for the same year of \$35,645.83 while the Board determined that there was a deficiency of \$42,842 (arising, however, from adjustments not here in issue). In the Campbell case the Commissioner assessed an income tax deficiency of \$86,937.47 for the year 1933, and in the Rogers case a deficiency of \$65,549.60 for the same year. The Board found that there was no income tax deficiency on the part of either Campbell or Rogers. We think that its orders in all four proceedings should be affirmed.

In each of the above cases the taxpayer involved was given a remainder interest in a trust created by will. Certain personal securities that were a part of the corpus of the particular trust were delivered by the trustee to the taxpayer after the right to possession became fixed by the termination of the prior beneficial estate. Some of these securities were acquired by the testator during his lifetime, some of them were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established. Securities derived by the trustee in the various ways mentioned

were delivered by him to the taxpayer and sold by the latter.

56 In assessing income taxes upon alleged profits realized by the taxpayer the Commissioner used the following bases for computing gains: In the case of securities which had been owned by the decedent, their fair market value at the time when distributed by the executor to the trustee; in the case of securities purchased by the executor or trustee, the cost to such fiduciary; in respect to certain securities purchased by a fiduciary prior to March 1, 1913, as in Gambrill's case, the value on that date, whenever cost was unknown. The Board of Tax Appeals, however, took the view that, because of the provisions of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932, the proper basis in all cases was the fair market value of the securities at the "time of the distribution to the taxpayer" by the trustee, no matter when or how the trustee or the executor might have derived the particular securities.

In determining how long a taxpayer had held securities for the purpose of computing capital gain or loss under Section 101 of the Revenue Act of 1928 the Board used the dates of delivery of the securities by the trustee to the taxpayer. The Commissioner, on the other hand, used the date of the death of the testator as the beginning of the period of holding securities owned by the latter and the date of purchase by the fiduciary as the beginning in cases where securities were purchased by the executor or trustee.

We agree with the conclusion of the Board that Sections 113 (a) (5) of the Revenue Acts of 1928 and 1932 govern the computation of loss or gain in the cases before us. The pertinent provisions read as follows:

"(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

57 "(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the tax-

payer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *

None of the securities involved in the cases before us were acquired "by specific bequest" or were "acquired by the decedent's estate from the decedent." They were all directly acquired from testamentary trustees. Accordingly the basis was not "the fair market value of the property at the time of the death of the decedent." Therefore the third clause of Section 113 (a) (5) which embraces "all other cases" of property acquired by will is controlling. That clause provides that: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

58 The words "the property" in the foregoing sentence seem inevitably to relate to the particular property sold by the taxpayer to whom it was distributed by the trustee. The term "taxpayer" is defined by Section 701 (a) (13) of the Revenue Acts of 1928 and 1932 as "any person subject to a tax imposed by this Act." It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words "fair market value of the property at the time of the distribution to the taxpayer."

Perhaps the most strenuous objection made by the Commissioner to adopting what seems to be the clear meaning of the statute is that increment in value between the date of the decedent's death and the time of distribution to the taxpayer is not subjected to taxation when the securities are sold and thus tax resources are impaired. But it is frequently true that increments are not subjected to taxation. One common case where increment in value is disregarded is that which occurs during the lifetime of an owner of securities which are not sold by him but are sold after his death by his executors, administrators, trustees, or remaindermen under his will. Such an increment accruing during the lifetime of the owner of securities has never been taken into account in computing gain or loss upon sales after his death. Increment between the date of death of the owner of securities and the date of distribution by an executor to a legatee is also to be disregarded under the third clause of Section 113 (a) (5) in the case of dis-

tribution of securities which are transmitted by virtue of a general bequest.

The supposed loss in revenue due to a disregard of fluctuations in the market value of securities between the date of death and the time of distribution is moreover somewhat fanciful, for in all cases where the property depreciates in value between the date of death and the date of distribution a larger tax would result from fixing the basic value at "the time of the distribution to the taxpayer" than from fixing the basis at the time of the testator's death.

The further contention of the Commissioner that the word "taxpayer" as used in the third clause of Section 113 (a) (5) should be construed as meaning the "trustee" and that the phrase "time of the distribution to the taxpayer" ought to be interpreted as meaning "the date when the executors transferred the property to the trustees," seems to us without warrant. The taxpayers here are undoubtedly the respondents. The trustees are separate entities and as such are neither agents of the respondents nor mere passive fiduciaries. It is true that under certain circumstances they might themselves have become taxpayers in respect to the corpus of their trusts, but only in case they had made sales of some of the securities composing the corpus—not, as here, when without making any sales they wound up their trusts and distributed the corpus to remaindermen. To treat the trustee and beneficiary remainderman, as the Commissioner wishes us to do, as a "sort of dual tax personality" is to disregard the plain language of the statute and to adopt a concept which seems to us to defy analysis. In view of the clear terms of the third clause of Section 113 (a) (5) it can make no difference whether the interest of any remaindermen be vested, vested subject to be divested, or contingent. In either event the basis should be "the fair market value at the time of the distribution to the taxpayer," i. e., to the respondent whose income taxes are being reviewed, and not to the trustee.

In respect to the securities purchased either by the executors or trustees the Commissioner says they do not come within the third clause of Section 113 (a) (5) because they were not acquired by will. This requires a most technical interpretation of the clause and one that in our opinion is not sound even technically. Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interest and without it they would have had no standing and would have received nothing. *Lyeth v. Hoey*, 305 U. S. 188, 194-195.

It is further argued that the Senate Report in respect to the enactment of Section 113 (a) (5) in the 1928 Act justified the Commissioner's interpretation of the statute. In dealing with the

third clause the report said: "It would also apply in cases where the executor purchases property and distributes it to the beneficiary." There is, however, no reason because of this mention of purchases by the executor for limiting the application of the report to property so purchased. In cases where a trust has been created by will the executor will often act as trustee before the trust is actually set up and sometimes will sell and purchase securities on behalf of the trust. Indeed the statement in the Senate Report would not cover the particular facts before us except in situations where the executor so acted.

The Commissioner apparently contends that the decision in *Brewster v. Gage*, 280 U. S. 327, fixing the date of death as the time when property should be valued under the provisions of the Revenue Act of 1921, for the purposes of computing gain or loss, affords some guide in interpreting Section 113 (a) (5). The difficulty in maintaining such a contention is that Section 113 (a) (5) is specific, that it fixes a different date for valuing acquisitions of property from that of the Act of 1921, and that the opinion in *Brewster v. Gage* says at page 337: "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

In *United States v. Nostrand*, 94 F. (2d) 510, and *Commissioner v. Libbey*, 100 F. (2d) 458, the Court of Appeals of the First Circuit held that the basis for computing gain or loss to the taxpayer was the market value of the property at the time of distribution by the trustee to the remaindermen, and not the value at the time of distribution by the executor to the trustees. These decisions, rather than that of the Seventh Circuit in *Commissioner v. Maguire* rendered on March 5, 1940, are in accord with our view.

The second question is whether the securities passing to the respondents Gambrill and Knox were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were "capital assets" as defined in Section 101 (c) (8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents, did not have "for the purpose of determining gain or loss from a sale * * *, the same basis * * * in his hands as it would have in the hands" of the trustees.

On behalf of the Commissioner it is argued that the decision of the Supreme Court in *McFeeley v. Commissioner*, 296 U. S.

102 requires us to find that the securities had been held from the date of death and that they therefore were held for more than two years prior to sale. That decision, however, involved an estate where there was no trust. The court only decided that the general legatee held the securities which were transferred to him by the executor from the date of death. We agree with the Board that the intervening trusts broke the continuity so that the taxpayer only held the securities from the time they were distributed to him.

62 In the Campbell case certain Woolworth stock was purchased by the taxpayer prior to distribution to her by the trustee of other shares of the same kind. If she did not hold the shares she acquired under the will until they were distributed to her by the trustee, under the "first-in-first-out" rule, her own shares should be treated as sold prior to those which were delivered to her by the trustee. We agree with the Board that her own shares must be regarded as sold first. During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own. *Helvering v. San Joaquin Fruit & Investment Co.*, 297 U. S. 496.

The orders of the Board of Tax Appeals are affirmed.

63 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER
v.

RICHARD VAN NEST GAMBRILL, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed June 28, 1940

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

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64 [File enlargement omitted.]

65 [Clerk's certificate to foregoing transcript omitted in
printing.]

66 Supreme Court of the United States

Order allowing certiorari

Filed November 12, 1940

The petition herein for a writ of certiorari to the United States
Circuit Court of Appeals for the Second Circuit is granted.
, And it is further ordered that the duly certified copy of the
transcript of the proceedings below which accompanied the peti-
tion shall be treated as though filed in response to such writ.

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